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NO. 79-475

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

JICARILLA APACHE TRIBE,
PETITIONERS,

V.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS,

STATE OF NEW MEXICO,
AMICUS CURIAE.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON IN OPPOSITION

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AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON IN OPPOSITION

The State of Washington submits this amicus curiae brief in opposition to the petition for writ of certiorari

in this proceeding in relation to question (1) of the "questions presented" as set forth in 48 L.W. 3297 (October 30, 1979).

QUESTION PRESENTED

"Question presented" (1) provides:

> "Do provisions of New Mexico Enabling Act and New Mexico constitution, in which people of New Mexico agree and declare that lands held or owned by Indian tribes shall be remain and control under absolute jurisdiction of the U.S. Congress, preclude adjudication of water rights of Jicarilla Apache Tribe in New Mexico state court?"

Washington State's interest in this case is heightened because it's Constitution and related Enabling Act are almost exact counterparts to those of New Mexico. Further, the State is interested because it has been conducting, over the last two decades, an active state court general water rights adjudication program in state court

which applies to federal reserved rights including such rights held by or for the benefit of Indians.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS VERY RECENTLY HELD THAT FEDERAL STATUTES ALLOW FEDERAL INDIAN RESERVED WATER RIGHTS TO BE ADJUDICATED IN STATE COURT.

The first issue, whether the federal statute known as the "New Mexico Enabling Act" precludes the adjudication of federal Indian reserved rights, is solely a matter of federal statutory interpretation. Federal statutes relevant to resolving the issue, including the McCarran Amendment, 43 U.S.C. §666, were considered in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). In that 1976 decision, the Court, after very extensive briefing, including an express submission of the

federal Enabling Act contention presented again to the Court in this proceeding,[1] held that Congress had consented to have all federal reserved water rights, including reserved rights for Indians, adjudicated in state general water adjudications proceedings. See also United States v. District Court in and for Eagle County, 401 U.S. 520 (1971).

II. WHETHER A STATE'S CONSTITUTION PRECLUDES THE GENERAL ADJUDICATION OF FEDERAL INDIAN RESERVED RIGHTS IN A STATE COURT DOES NOT PROVIDE AN APPROPRIATE BASIS FOR ISSUING THE REQUESTED WRIT.

The second issue involves a matter of state constitutional interpretation. The meaning of a state constitutional provision is a primary responsibility

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1/ See Amicus Curiae Brief of Southern Ute Indian Tribe (and 14 tribes or other Indian organizations), filed in Colorado River Water Conservation District, at pp.6 and 23-26.

of the state's courts. This Court does not normally venture into that arena. See Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861 (1974).

Further we note that the Washington State Supreme Court, in patterns analgous to the state constitututional issues raised in this proceeding, has provided constitutional interpretation roadsigns stating that the "disclaimer" and "absolute jurisdiction" wording of Washington's constitution (Art. XXVI, sec. 2) does not preclude adjudication of reserved water rights benefitting Indians in Washington State courts. See State v. Paul, 53 Wn. 2d 789, 794, 337 P.2d 33 (1960); Makah Indian Tribe v. State, 76 Wn.2d 485, 456 P.2d 590 (1969); and The Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966), cert. den. 387 U.S. 907. See also, Washington v. Yakima

Indian Nation, 439 U.S. 463 (1979).

III. FOR FIFTEEN YEARS FEDERAL RESERVED RIGHTS, BOTH NON-INDIAN AND INDIAN, HAVE BEEN ADJUDICATED IN WASHINGTON STATE COURTS.

After many years of dormancy, in 1964, the State of Washington initiated a general adjudication program. Since that time federal reserved rights have been subject to state adjudication in eleven state court general adjudications with the Department of Justice representing the United States or an Indian as claimant. On two of these occasions the reserved rights involved were Indian reserved rights. In In re Chiliwist Creek, No. 16323 (Super. Ct. of State of Wash., Okanogan County, Judgment entered May 16, 1967) 2/

2/ This case was appealed by a party other than the United States to consider issues not relevant here, In re Chiliwist Creek, 77 Wn.2d 658 (1970).

the United States did not appeal either the state superior (trial) court's determination of jurisdiction to adjudicate the Indian reserved right or the scope, nature and priority of the right. In In re Bonaparte Creek, No. 17,787 (Super. Ct. of State of Wash., Yakima County, filed 1965), involving an Indian claiming a reserved right in a state general adjudication and represented by the Department of Justice, the Department of Justice has neither attempted to remove nor challenge the jurisdiction of the state court to adjudicate an Indian reserved right of an Indian allottee.3/

3/ A final decree of the trial court is set for entry on December 7, 1979 in In re Bonaparte Creek, supra. Therefore, we cannot state with certainty that a jurisdictional challenge to the state court through appeal, by the Department of Justice, will not be initiated. We can only say we have never been advised at any stage

It is relevant to a decision on the pending petition, in terms of historical as well as contemporary understanding, that the State of Washington has been adjudicating federal reserved rights, Indian and non-Indian, in relative harmony with the Department of Justice and the Indian parties long before Eagle and Colorado River Water Conservatory District, supra, were decided. See generally Oliphant v. Suquamish Tribe,

3/ (continued)
of the proceedings that the jurisdictional issue might be raised by appeal.

There is a third case probably involving Indian reserved rights. In State of Washington v. Acquavella, No. 77-2-0148405 (Super. Ct. of State of Wash., filed October 25, 1977), a state court adjudication of the Yakima River system, the court has not reached a stage to know exactly what reserved rights, non-Indian or Indian, will be claimed. This case was removed to federal court and subsequently remanded by that court, at the request of the State of Washington, to state court.

435 U.S. 191 (1978). On some occasions during the past fifteen years, the actions of non-appeal by the Department of Justice lead to the conclusion that, at least in Washington State, state courts sometimes (in the eyes of the Department) have jurisdiction to adjudicate federal (Indian) reserved rights.

CONCLUSION

In relation to the issues pertaining to "question presented" (1), we urge the petition should be denied. We express no views on the other issues raised.

Respectfully submitted,

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